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IN THE

Supreme Court of the United States

October Term, 1949

No. 656

RING CONSTRUCTION CORPORATION, *Petitioner*

vs.

THE SECRETARY OF WAR OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

SUBJECT INDEX:

	PAGE
Opinions below	2
Jurisdiction	2
Questions Presented:	
1. Right of judicial review of case or controversy presented by proceedings	2
2. Constitutionality of Section 403(e)(1) and (2) of Renegotiation Act, as amended	2-3
3. Refusal of U. S. Court of Appeals for the District of Columbia to review order of The Tax Court	3
4. Error of Courts below in failing to make a distinction between subcontracts and direct contracts	3
Statutes Involved	3 to 6
Statement	7 to 17
Specification of Errors	17 to 18
Reasons for Granting Writ	18 to 27
Prayer for Writ	27-28
Memorandum Brief Supporting Application	29 to 36

CASE INDEX:

Cited in Petition

Aircraft & D. Equipment Corporation, 331 U. S. 752	19
Brinkerhoff-Faris Trust and Savings Company vs. Hill, 281 U. S. 673 (74 L. Ed. 1107)	25
Dayton-Goose Creek Ry. Co. vs. United States, 263 U. S. 456 (68 L. Ed. 388)	19
Estep vs. United States, 327 U. S. 114 (90 L. Ed. 667)	24
Lichter vs. United States, 334 U. S. 742 (92 L. Ed. 1694)	19
Mertens' Law of Federal Income Tax Vol. 4, page 396—1942 Ed.	26
Old Colony Trust Company vs. Commissioner, 279 U. S. 716	22
Ohio Valley Water Co. vs. Ben Avon Borough, 253 U. S. 289	23

PAGE

St. Joseph Stockyards Co. vs. United States, 298 U. S. 38 (80 L. Ed. 1033) 24
U. S. Electrical Motors, Inc. vs. Jones, 153 Fed. (2d) 134 19

Cited in Memo.

Bowles, Administrator, Office of Price Administration v. Willingham et al, 321 U. S. 503, 64 S. Ct. 641 30
Chicago, M. & St. P. Ry. Co. v. State of Minnesota ex rel. Railroad and Warehouse Commission, 134 U. S. 418, 10 S. Ct. 462 30
Chicago, etc. Ry. v. United States, 104 U. S. (Otto) 680, 26 S. Ct. Rep. 891 32
Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565 32
Crowell, Deputy Commissioner v. Benson, Crowell, Deputy Commissioner et al v. Same, 285 U. S. 22, 52 S. Ct. 285 30
Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456 32
Estep vs. United States, 327 U. S. 114 33
Knowles vs. Hirsch, 65 Fed. Supp. 690 35
Lynch vs. United States, 292 U. S. 571, 54 S. Ct. 840 32
Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 S. Ct. 622 30
Myers et al v. Bethlehem Shipbuilding Corporation, Limited, Same v. Mackenzie et al, 303 U. S. 41, 58 S. Ct. 459 30
Nebbia vs. People of the State of New York, 291 U. S. 502, 54 S. Ct. 505 31
Ohio Valley Water Co. v. Ben Avon Borough et al, 253 U. S. 287, 40 S. Ct. 527 30
Perry v. United States, 294 U. S. 330 32
Phillips et al v. Commissioner of Internal Revenue, 283 U. S. 589, 51 S. Ct. 608 32
Sinking Fund Cases, 99 U. S. (Otto) 700, 25 S. Ct. Rep. 504 32
St. Joseph Stockyards Co. v. United States et al, 298 U. S. 38, 56 S. Ct. 720 30
United States v. Central Pacific Power Co., 118 U. S. 235, 6 S. Ct. 1038 32

PAGE

United States v. New River Collieries Co., 262 U. S. 341, 43 S. Ct. 565 30
United States v. Northern Pacific Ry. Co., 256 U. S. 51, 41 S. Ct. 439 32
Yakus v. United States. Rottenberg et al v. Same, 321 U. S. 414, 64 S. Ct. 660 30

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia dismissing petition to review decision of The Tax Court of the United States for lack of jurisdiction, and order entered January 14, 1950, denying petition for rehearing.

OPINIONS BELOW

The findings of fact and opinion promulgated by The Tax Court of the United States herein are reported at pages 27 et seq. of the record. (8 T. C. No. 122). The order and decision made and entered by The Tax Court pursuant to its opinion are found at pages 58 to 60 of the record. The order of The Tax Court was entered March 23, 1948 and its decision on said order was entered April 6, 1948. The opinion of the United States Court of Appeals for the District of Columbia is found at R. Vol. III pages 957 et seq. of the record.

JURISDICTION

The findings of fact and opinion of The Tax Court of the United States were promulgated May 15, 1947 (R. Vol. 1, pp. 27 to 57). The order of The Tax Court was entered March 23, 1948 (R. Vol. 1, pp. 58-59). The decision of The Tax Court was entered April 6, 1948 (R. Vol. 1, p. 60). Petition to review decision of The Tax Court by the United States Court of Appeals for the District of Columbia, pursuant to 26 USCA 1141 and 1142, was filed May 18, 1948 (R. Vol. 3, p. 946). The jurisdiction of this Court is invoked under the provisions of Section 347(a), Title 28 USCA, and Sections 1141 and 1142, Title 26 USCA.

QUESTIONS PRESENTED

1. The right of petitioner to full judicial review of all questions of law and facts involved in the case or controversy presented herein under the judicial articles of the Constitution of the United States pursuant to 28 USCA 347(a) and 26 USCA 1141 and 1142.

2. The constitutionality of Section 403(e)(1) and

(2) of the Renegotiation Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943 with respect to its provisions being a denial of judicial review within the meaning of the judicial articles of the Constitution of the United States.

3. The refusal of the United States Court of Appeals for the District of Columbia to review the errors of law claimed to have been committed by The Tax Court of the United States; and the adequacy of the judgment of the Court—with respect to full judicial review sought by the appeal—when limited to the constitutional question as decided.

4. The refusal of the Court to hold the Renegotiation Act unconstitutional under the Fifth Amendment to the Constitution as applied to a contract *directly with the Government* for the erection of *ordinary cantonments.*

5. The Court erred in refusing to hold the Renegotiation Act unconstitutional under the Fifth Amendment as applied to contracts between a *general contractor* and the *Government.*

STATUTES INVOLVED

Section 347(a), Title 28, USCA, reads as follows:

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Courts of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Sections 1141(a) and (b) and 1142, Title 26 USCA, read as follows:

"(a) JURISDICTION. The circuit courts of appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of The Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the dstrict courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of title 28 of the United States Code.

(b) VENUE

(1) IN GENERAL. Except as provided in paragaraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) BY AGREEMENT. Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

(3) APPLICATION OF SUBSECTION. This subsection shall be applicable to all decisions of the Tax Court rendered on and after May 10, 1934, and section 1002 of the Revenue Act of 1926, 44 Stat. 110, as in force prior to May 10, 1934, shall be applicable to such decisions rendered prior thereto, except that paragraph 2 of this subsection may be applied to any such decision rendered prior to May 10, 1932."

"SEC. 1142. PETITION FOR REVIEW

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of

Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered. 53 Stat. 165, amended Oct. 21, 1942, 4:30 p.m., E.W.T., c. 619, Title V, Sec. 504(a), (c), 56 Stat. 957."

Section 403(e)(1) and (2) of the Renegotiation Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943 (Internal Revenue Code) reads as follows:

"(e)(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have *exclusive jurisdiction, by order, to finally determine the amount,* if any, of such excessive profits received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.* The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to *finally determine the amount,* if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114,

1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply." (Italics supplied)

STATEMENT

1. The petitioner is a Maryland corporation with principal place of business in Minneapolis, Minnesota.

2. The case involves two contracts for the construction of Cantonments in Camp McCoy, one in the amount of $6,838,412.21, and the other in the amount of $80,576.30. The government paid the petitioner in full for this work, together with some extras, less some deductions for changes.

3. The actual allowable and reasonable job costs on the said two jobs, exclusive of compensation paid or incurred to M. J. Ring, Martin Ring, M. A. Floyd and A. J. Wiik, and exclusive of Wisconsin income taxes and interest thereon, and exclusive of federal income taxes and interest thereon, and exclusive of any profit, was the sum of $4,936,172.52.

4. The larger of the two contracts was entered into and work was commenced *before* the Renegotiation Act was passed. The smaller contract was entered into in October, 1942.

5. Floyd had a profit-sharing contract with the petitioner substantially similar to earlier contracts with him in force since June, 1939, and Wiik had a profit-sharing contract with the petitioner in existence since June 16, 1939, and had been working under similar contracts with petitioner since 1934.

6. By the term of the contracts with Floyd and Wiik they were each to receive 10% of the profits earned by the petitioner on jobs estimated and superintended by them.

7. The amount of compensation to which Floyd and Wiik were entitled under their contracts, without giving effect to renegotiation of the petitioner, was $110,275.32 for Floyd and $102,388.91 for Wiik. Both of said con-

tracts of employment were approved by the Salary Stabilization Unit of the Treasury Department of the United States on March 9, 1943. The compensation earned by Wiik and Floyd for the years 1936 to 1941, inclusive, based upon the profit-sharing contracts, was as follows:

	A. I. WIIK	M. A. FLOYD
1936	$2,400.00	
1937	3,000.00	
1938	13,891.75	
1939	2,400.00	$18,238.55
1940	3,400.00	
1941	16,400.00	29,322.28

8. The contract sales and job profit of Ring Construction Corporation for the years 1938 to 1941, inclusive, are as follows:

Year Ended	Contract Sales	Job Profit
1938	$1,286,000	$111,000
1939	239,000	13,000
1940	1,336,000	153,000
1941	1,804,000	269,000
TOTAL	$4,665,000	$546,000

9. The job costs above referred to did not include the petitioner's expenses for carrying out the renegotiation proceedings.

10. *All of the foregoing facts were stipulated.*

11. The principal contract was dated March 26, 1942, and the material facts concerning that contract are as follows:

The contract included provisions for unit prices for certain typical items to control if additional items of that kind were ordered or if any of them were eliminated. Certain buildings were to be completed within 105 days, and the remaining units within 180 days, and the whole job was to be completed within 180 days. This was calendar days, not working days. There was a provision for

liquidated damages for delay with respect to the first group of items at the rate of $15.00 per structure per calendar day of delay "until the work is completed and accepted." It was further provided "no building shall be considered complete until all water, gas, electricity and storm sanitary lines are completed according to the specifications and functioning in such a way as to perform services contemplated by the contract". (See Contracts Special Conditions-6) Bidders were required to visit the site and familiarize themselves with conditions, and failure to visit the site would not be held sufficient grounds for additional compensation (Cont. Spec. Cond.-7). The work was to be planned and carried out as directed by the government and in accordance with progress charts specified (Cont. Spec. Cond. 28). The contractor was required to submit for approval, in writing, a list of all sub-contractors, and no work could be sublet without the approval of the government (Cont. Spec. Cond. 18). The general contractor was to guarantee all material, equipment and workmanship against defects for a period of one year from the date of acceptance (Cont. Spec. Cond. 19). All wages to be paid were specified (Cont. Spec. Cond. 25). The contractor was required to furnish sufficient labor and equipment and work such hours, including nights, Sundays and holidays, as might be necessary to comply with the progress schedule (Cont. Spec. Cond. 28). The contractor was to assume full responsibility for the work against all hazards (Cont. Spec. Cond. 36). The contractor was required to furnish safeguards and safety devices reasonably necessary to protect the life and health of its employees (Cont. Spec. Cond. 37). The contractor was to pay all federal, state and local taxes imposed prior to the date of the contract (Spec. Cond. 63). The contractor was required to give a performance bond and a payment bond for the protection of labor and material supplied. The government was to authorize the contractor to dismiss any employee deemed incompetent or careless

(Gen. Cond. 12). The governent was made the interpreter of the intent and meaning of the drawings and specifications (Gen. Cond. 15). In case of discrepancies the government was to determine which provisions to follow (Gen. Cond. 27). The size of the undertaking can be understood by seeing the list of drawings set forth in Spec. Cond. 40. There was nothing in the contract to protect the contractor against loss resulting from unforseen circumstances or an erroneous estimate of cost (Spec. Cond. 63). The government reserved the right, under certain conditions, to take over the work, including the materials and equipment on the site, to finish the job at the expense of the contractor (see Contract Article 9). The government was the final judge in all disputes (see Contract Article 9) (Article 15). The government reserved the right to terminate the contract at any time in its sole discretion (cont. Art. 28). The government reserved the right to require the contractor to pay overtime rates of pay for overtime work (see Article 30). The construction work here involved was limited to Areas (E) and (C), although the specifications referred to Areas (A) and (G), inclusive. The petitioner was actually required to pay penalties for delay in the amount of approximately $14,000 (J. A. 127). Each day of delay would have resulted in a penalty of $7,500.00 (J. A. 127).

12. Morris Ring was the president and general manager of petitioner, and he and his family own all of the stock of the corporation. He had lived in Minneapolis about 32 years (J. A. 92). At the time the contract was entered into the petitioner had a net worth of $750,000.00 (J. A. 95). The request for bids came to the petitioner's attention about February 28, 1942 (J. A. 95). The plans were received about March 10, 1942 (J. A. 96). The bids were opened March 16, 1942 (J. A. 97). Camp McCoy is in a smalltown area and all of the labor had to be imported from other places (J. A. 97). Mechanics who were not trained were required to be used (J. A. 100). The

nearest city to Camp McCoy was Chicago (J. A. 100). The difficulties of obtaining labor at Sparta where Camp McCoy was located, were increased by war conditions (J. A. 100). Labor was not as productive as formerly. There was difficulty in obtaining building materials (J. A. 101). The job required approximately 20,000,000 board feet of lumber (J. A. 101). The bid was submitted by Morris Ring on behalf of petitioner after collaboration and consultation with others in the company (J. A. 102, 103). The figures placed on the estimate sheets represented his best judgment as to the cost of performing the work besides an allowance for overhead and profit (J. A. 103). The rate of profit estimated and included in the bid was the same as generally calculated on similar work in the past (J. A. 103).

It was the regular practice of the governmental agencies in determining whether or not to let a contract after bids had been received, to make a comparison between the bids and their own estimate (J. A. 105-108).

If the bid did not run substantially over the estimate they let the job (J. A. 108-109).

Major Humphrey, who had charge of the letting of the job, stated to Mr. Ring: "Although your bid is about five per cent higher than we estimated the job cost of it, we will recommend it for acceptance" (J. A. 109).

Three or four hours later, they announced the awarding of the contract to the Ring Construction Corporation (J. A. 109).

13. There are great hazards involved in the performance of this contract because of the penalty for the delay, and there could have been a loss of one-half million dollars to a million dollars, instead of a profit. (J. A. 127).

14. Neither Floyd nor Wiik were ever stockholders of the Ring Construction Corporation, and, aside from

their profit-sharing arrangement for employment, they had no other relationship whatsoever with the company; nor are either of them members of the Ring family, nor related by marriage or blood.

15. Madsen, Schumacher, Watson & Associates were successful bidders on other areas at Camp McCoy two days before the letting of the Ring contract (J. A. 139-140). The bid was read publicly by Colonel Humphrey (J. A. 140).

He announced the unit prices for the typical buildings, included in the bid, of which Ring made a memorandum. He gave the memorandum to Wiik, who made a record of it (J. A. 140).

Eight or ten days after the work was started by Ring, he had a talk with Colonel Humphrey on the 'phone, who said, "Area D was advertised for jobs and the bidder, the low bidder is not going to accept (get) the job" (J. A. 141) because his bid was way above the government's estimate (J. A. 141) and before re-advertising, Colonel Humphrey was trying to learn if anybody else would take over Area D. Ring didn't think it was advisable to take on any more at Camp McCoy and he told them why (J. A. 141). Humphrey said, "If you would want to negotiate we will offer you a five per cent above your unit price that you have in your contract already (J. A. 142). Ring did not accept the proposal (J. A. 142).

16. Variations in the cost of labor for the handling of lumber per thousand feet might be as much as fifteen dollars a thousand under differing conditions. The estimate on labor involved a hazardous speculation "definitely." The manner in which the job was handled reduced the estimated cost of overtime. The job was organized near one hundred per cent efficiency. The weather conditions as forecast in the estimate of the job were based upon *normal* rainfall. There was very *little* rain-

fall; this worked out to considerable advantage of Ring. They worked almost every day (J. A. 197-201).

17. Mr. Wiik referred to the memorandum given to him by Ring respecting the unit prices of other contractors at Camp McCoy, and gave two or three typical items. The unit price on barracks in the Ring bid and contract was $14,450.00, of which there were one hundred ninety-two, constituting about half the job (J. A. 200). The unit price on this item in the Madsen Company contract was $14,475.00, a difference of twenty-five dollars per building. The unit price on type A concrete, including forms, in the Ring bid was twenty-five dollars per cubic yard. The Madsen price was twenty-nine dollars per cubic yard; type E concrete—Ring twenty-six dollars, Madsen thirty dollars (J. A. 200-201).

18. Two stipulations were made at T. p. 293, as follows:

Petitioner at all steps protested being required to participate in renegotiation proceedings—the unilateral determination was dated December 20, 1943, a correct copy of which is attached to the petition in this case—the copy of the communication from the Internal Revenue Agent attached to the petition and, dated February 11, 1944, having to do with the matter of taxes, is a correct copy of the original communication.

19. In certain periods the mortality rate of contractors has been very high. The largest and so-called best construction firms in the country have met with disastrous financial reverses. This is true because it is the nature of the business to sell the market short. The average range of bids on public works is 25% between the low and the high bid, and this occurs frequently. As between the low bid and the next low bid, the range is between 5% and 10%. This has been true for many years. In 1942 the conditions were fairly stable, and the discrepancy between bids was not so great. At that time it was probably 5%

between the low and the second man, and 15% between the low and the high man. This was shown by a qualified expert, and not contradicted. He gave it as his opinion that in 1942 there definitely was actual competition in the field of work with which we are here concerned. There was no contradiction to the testimony of another expert, George Heller, that the contracting business was very much of a speculative and risky business (J. A. 270-272).

20. For the purpose of sustaining the claimed constitutionality of the act, applied retroactively to the principal contract of the petitioner, the case was adjourned to Washington where the court took testimony on the "background of the constitutional problems." Although the court held that the burden of proof was on the petitioner to show that it had not received excessive profits (J. A. 63-74), the respondent assumed the burden of going forward with respect to the "background of the constitutional problems." Outside of opinions of government witnesses as to the need for a Renegotiation Act to prevent profiteering generally, the testimony was directed primarily to the issue of whether or not competition had broken down in the field of the erection of cantonments. *The testimony shows clearly and unequivocally that the government was in a position to deal at arm's length with the petitioner in connection with the Camp McCoy work; that there was no overreaching, and that the price arrived at was an eminently fair one.* There is no dispute but what the government, with full knowledge of the passage of the Renegotiation Act, which occurred subsequent to the making of the principal contract with the petitioner, carried out its contract and paid the consideration therefor in full before asserting any right to renegotiate. It is undisputed that the government had the absolute right to terminate the contract at any time. Promptly upon the passage of the act the government was in a position where it could hold the petitioner to the contract by a failure to terminate it and then take the inequitable position that, al-

though intending to keep the petitioner bound to this principal contract, it would be free to repudiate the contract price. *This is exacly what it did.* There was much loose testimony and intensive cross examination of government witnesses concerning the question of whether or not there was competition at the time the work was let to Ring. There was no proof whatsoever of lack of competiton in *this* field, whatever may be said of other fields of war activities, nor was there anything to indicate that the government could not, and did not, deal at arm's length with the petitioner. Moreover, the government's own witness, Lt. Col. O. P. Easterwood, of the office of Chief of Engineers in Washington, clearly testified to support the Petitioner's position. His testimony is found in J. A. pages 816-819. In his uncontradicted testimony he showed that the people in the field were requested to obtain competition wherever it was practical to do so; that if the bids were too high they were rejected; that in many cases construction work was let on the basis of competitive bidding, and that this practice was quite extensive; that the government knew whether the bids were too high because the government estimated each job, and this was done by competent estimators; that the government made plans and specifications and estimates in most cases, and that this practice continued throughout the war.

Most of the findings of fact made by The Tax Court are consistent with the foregoing (J. A. 28). Material exceptions are the following: The court found as a fact that a substantial portion of the estimated cost was reduced by the skill of Morris Ring in shopping for lower bids after the contract was awarded to him, and that he had reason to believe that he could do so. Nowhere does the court find as a fact that the government had not made a fair arm's length deal with the petitioner, nor that it was impracticable to let contracts for the erection of cantonments at the time the petitioner's contract was let on

a basis which would adequately protect the government against an unfair price; nor does the court comment on the fact that the government, having the right to terminate the contract, elected to hold the petitioner to his contract, claiming the right to repudiate it later, after it had been fully performed. There is not a word of evidence in the record to show that the fair value of the services and materials, which the petitioner agreed to furnish, was less than the agreed price. The court merely assumed to determine after the event, with entire disregard to risks which were assumed, that the profits were greatly excessive. The court took the position that even though the risks were great, that since they did not materialize, no compensation ought to be paid for the assumption thereof.

21. The petitioner, while preserving its rights under the Constitution at each step of the proceedings, participated in the renegotiation, but did not agree to the amount claimed by the Government, whereupon the Secretary of War issued his unilateral determination demanding a return of $1,365,000, later reduced by The Tax Court to $1,208,965.13.

The administrative procedure was completely exhausted before a petition for review was filed in the Circuit Court. Ring Construction Corporation claimed numerous errors were committed by The Tax Court, not only in the determination of factual questions, but in matters of law. The Circuit Court held that the Renegotiation Act "places an exclusive and unreviewable jurisdiction in The Tax Court to determine the amount of excessive profits, including questions both of law and fact in such determination," and upon that basis refused to review any such issues. Petitioner argued that the Congress did not intend that the Renegotiation Act should be retrospective, as applied to the contract directly between the Government and a private contractor. Petitioner claimed before that Court that the Act was unconstitutional in its retroactive appli-

cation to the petitioner's contract directly with the Government upon its construction of *Lichter* vs. *United States,* 334 U. S. 742. The Circuit Court overruled the petitioner's contention, completely ignoring the very careful language of that opinion which indicates that this court did not intend that decision to apply to a contract directly with the United States; and it said that a national crisis justifies the exception to the previously well established rule to the contrary. Petitioner urged that even if the Act might be validly applied to such a contract retroactively with respect to certain types of war supplies, an exception ought to be carried out with respect to the type of work to be done by the petitioner under its first and large contract, there being no difficulty in fairly ascertaining such costs before letting a contract in the field of erection of cantonments, apparently ignoring the language of this court when it said "The Renegotiation Act is constitutional *on its face.*"

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

1. In refusing to review the errors of law committed by The Tax Court in its decision.
2. In refusing and declining to take plenary jurisdiction of the proceeding herein pursuant to the judicial articles of the Constitution of the United States for a full judicial review and consideration of the questions involved in the *de novo* proceeding before The Tax Court.
3. In holding that the rights of petitioner against the United States, arising out of a contract with it, are not protected by the Fifth Amendment.
4. In applying the Renegotiation Act to the large contract for the erection of cantonments.
5. In by-passing judicial review and/or consideration of the decision of The Tax Court of the United States on the ground that the exercise of its functions

under the judicial articles of the Constitution of the United States had been withheld by Section 403(e)(1) of the Act of October 28, 1942 as amended by Section 701(b) of the Revenue Act of 1943.

6. The court erred in failing to allow as part of the job cost the entire sum found by it to be due under contract to each Messrs. Floyd and Wiik, pursuant to the First Amendment of the Renegotiation Act, Sec. 403 (c) (3).

REASONS FOR GRANTING WRIT

1. The application for a writ herein presents a grave and basic constitutional question, viz.: Can Congress, by Section 403(e)(1) and (2) of the Renegotiation Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943, make the decision of a purely executive or administrative body or board final and non-reviewable under the judicial articles of the Constitution of the United States without the limitation imposed being a denial of due process of law under the Fifth and Seventh Amendments to the Constitution of the United States?

2. The questions presented in this proceeding have to do with an express denial of judicial review by an act of Congress of a claim arising under the Fifth Amendment to the Constitution, viz:

(a) The taking of private property for a public use without just and/or reasonable compensation paid therefor.

(b) Limiting constitutional questions of law, arising under an act of Congress, to the determination of an administrative agency in the Executive Branch of the Government; and

(c) Withholding resort to the Courts to test the legal sufficiency of direct or indirect legislative fixing of a "fair return" for work done or services rendered under direct contracts with the Government that provide for specific amounts to be paid.

3. Section 403(e)(1) of the so-called Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943, enacted February 25, 1944, provides that The Tax Court shall exercise only the powers conferred upon it as an administrative agency in the Executive Department of the Government; but with respect to a judicial review of the determination of The Tax Court of the United States, the United States Court of Appeals for the District of Columbia, in dismissing the petition to review The Tax Court's order (erroneously called a judgment), holds and decides in this case that such review is expressly withheld from the Courts by the language of Section 403(e)(1) of the Renegotiation Act as amended. See its similar ruling in *U. S. Electrical Motors, Inc.* v. *Jones,* 80 U. S. App. D. C. 329, 331, 153 Fed. (2d) 134. The language of Section 403(e)(1) of the Act raises a basic and serious constitutional issue of denial of due process by an express withholding of full *judicial* review.

4. In the light of what this Honorable Court has said in the case of *Lichter* vs. *United States,* 334 U. S. 742 (92 L. Ed. 1694), there is grave doubt of the constitutionality of Section 403(e)(1) and (2) of the Renegotiation Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1934; and even though the Act be *"constitutional on its face"*—that being the sole constitutional question presented for decision in the *Lichter* case, supra —the remedy provided by Section 403(e)(1) for a limited proceeding of a *de novo* nature (see *Aircraft & D. Equipment Corporation,* 331 U. S. 752) before The Tax Court does not square with the requirements of due process of law as defined in *Dayton-Goose Creek Ry. Co.* vs. *United States,* 263 U. S. 456, (68 L. Ed. 388).

5. In the case of *Dayton-Goose Creek Ry. Co. supra,* the question was whether property had been taken without due process of law as provided by Section 15(a) of the Transportation Act of February 28, 1920 (41 Stat. 456), in the absence of judicial review; and the answer

to the question was that Section 15(a) of the Transportation Act—providing for the renegotiation of rates by the Interstate Commerce Commission—did not purport to make a determination of the Commission conclusive; thus it is only where an opportunity of judicial review is *withheld* by a legislative fixing of rates and/or a fair return for services rendered that constitutional rights are invaded. The Court said specifically on this point in the *Dayton-Goose Creek Ry. Co. case, supra,* viz:

> "It is further objected that no opportunity is given under Sec. 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. *It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution.* Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, P. U. R. 1920E, 814, 40 Sup. Ct. Rep. 527."

However, in the case of this petitioner the order of The Tax Court was given unreviewable finality. This appears to constitute a denial of due process.

6. The provisions of Subchapter B, Sections 1141 and 1142 of the Internal Revenue Code provide for judicial review of determinations by The Tax Court; and those sections are adequate with respect to the jurisdiction conferred upon such an administrative agency as a condition precedent to judicial review, Cf. *Aircraft and D. Equipment Corporation, supra;* but when the United States Court of Appeals for the District of Columbia says that,—

> "The questions raised by the petitioner, other than the constitutionality of the statute when retroactively applied, are not open to review by this court. Section 403(e) of the original Act, as amended by Sec-

tion 701 of the Second Renegotiation Act (Revenue Act of 1943, Title VII), provides that upon the filing of a petition for redetermination, the Tax Court

> '. . . shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.'

With respect to this unequivocal language we said in *U. S. Electrical Motors, Inc.* v. *Jones,* 80 U. S. App. D. C. 329, 331, 153 F. (2d) 134, 136 (1946):

> '. . . We think . . . the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, . . .'

We do not stop, therefore, to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court, but pass on to its argument that the Congress did not intend the Renegotiation Act to apply retroactively and that if so applied the statute is unconstitutional."

it in effect, if not directly, finds and holds that petitioner's opportunity for a judicial review of matters decided by The Tax Court in the *de novo* proceeding before it is *expressly withheld;* and that the Courts of Appeal of the United States do not have jurisdiction to review decisions of The Tax Court in matters committed to it in the first instance by Section 403(e)(1) and (2) of Section 403 of the so-called Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943 "in the same manner and to the same extent as decisions of District Courts in civil actions tried without a jury" as expressly provided by Section 1141 of the Internal Revenue Code, as amended.

7. In the *Lichter case, supra,* this Honorable Court did not hold that the lack of judicial review of legislative fixing of reasonable return to persons having contracts

with the Government by The Tax Court in a *de novo* proceeding was in accord with due process of law; nor did the *Lichter case, supra* present the question of the constitutionality of Section 403(e) (1) or (2) being in conflict with Sections 1141 and 1142 of the Internal Revenue Code with respect to judicial review of decisions of The Tax Court of the United States. All that was decided in the *Lichter case, supra,* was that the so-called Renegotiation Act was constitutional *on its face;* and that if it be unconstitutional because of any specific defects in its administration, an attack thereon may be presented for judicial consideration after the procedural remedies for a *de novo* proceeding before The Tax Court of the United States had been complied with, Cf. *Aircraft and D. Equipment Corporation, supra.*

8. There is grave doubt as to a *de novo* proceeding before The Tax Court of the United States—being the only remedy to raise a constitutional issue—being sufficient as due process of law; unless judicial consideration of a plenary character at some stage of the remedy provided be granted with respect to the exaction of so-called excessive profits. The analogy is a proceeding to assess and/or collect deficiencies in tax (see *Old Colony Trust Company* vs. *Commissioner,* 279 U. S. 716).

9. The constitutional functions of The Tax Court—to the extent that they may partake of a judicial consideration of questions submitted to it as an administrative agency in the Executive Department of the United States —demands and requires judicial review. (See *Old Colony Trust Company, supra.*)

10. Section 403(e)(1) or (2) of the so-called Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943, purports to utilize the functions of The Tax Court as defined by the Act of its creation; and with respect to the *de novo* proceeding so lodged, it is not important whether such a proceeding was originally begun

by an administrative or executive determination, but it is important that before the determination of The Tax Court becomes final—or more than *prima facie*—judicial review be not withheld (see *Dayton-Goose Creek Ry. Co.* vs. *United States, supra; Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 289).

11. The *de novo* nature of a proceeding before The Tax Court pursuant to Section 403(e)(1) and (2) of the Act does not make it *judicial* within the meaning of the *judicial articles* of the Constitution. (See *Muskrat* vs. *United States,* 219 U. S. 346). It may not be gainsaid that the claim of petitioner to the profits earned under the contracts of March 26, 1942 and October 3, 1942 presents a "case" or "controversy" within the meaning of Article III of the Constitution; nor that the demand of the Secretary of War for a refund or recapture of a part of said profits be not a chose in action vested in the United States. Therefore, it is clear that by the provisions of Section 403(e)(1) or (2) the regular proceedings established by law or custom for the protection or enforcement of rights are so restricted as to amount to an express denial of judicial consideration.

12. Any Act of Congress, or a provision thereof, that expressly withholds *judicial consideration*—within the meaning of the judicial articles of the Constitution—of a case or controversy of the kind presented in this proceeding, is a matter of grave concern to the public; and unless the constitutional rights of petitioner herein to a full and complete judicial consideration of the adequacy of the remedy that it must pursue (in order to resist the demands made upon it) be made clear by an authoritative determination of this Honorable Court, its rights to judicial consideration under the judicial articles of the Constitution will be limited vicariously to what an inferior tribunal says they are by reference to the opinion of this Honorable Court in the case of *Lichter* v. *United States,*

supra; or the constitutional functions of this Honorable Court will have been unconstitutionally withdrawn by Section 403(e)(1) or (2) and conferred exclusively upon The Tax Court of the United States. Cf. *Aircraft and D. Equipment Corporation supra.* The Tax Court was not restrained in its conclusions on the "constitutionality of the Renegotiation Act on its face", and it could have held the Act unconstitutional—rightly or wrongly. It did conceive the necessity of passing on the *constitutionality* of said Act as a segment of the matters submitted to it for an authoritative and/or conclusive determination thereof, viz.: the issue of due process of law relied upon by petitioner in the proceeding before it.

13. Section 403(e)(1) and (2) of the Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943, appears to delegate to The Tax Court of the United States, as an administrative agency in the Executive Department of the Government, authority to make findings of fact on the subject of amounts paid out under contracts with the Government being reasonable; but to say that its findings of fact and/or conclusions of law are *conclusive,* where constitutional rights of liberty and property are involved, is to place those rights at the mercy of administrative officials and seriously to impair the security intended by the judicial safeguards of Article III of the Constitution. (See *St. Joseph Stockyards Co.* vs. *United States,* 298 U. S. 38 (80 L. Ed. 1033). In the case of *Estep* vs. *United States,* 327 U. S. 114 (90 L. Ed. 667), it is held that Congress may not constitutionally make the findings of a Selective Draft Board *final and nonreviewable* by the Courts. That to do so is a *denial of due process of law;* and in a case where judicial review is withheld the door of the Constitution is closed to a person whose liberty is at stake or whose *property has been confiscated.*

14. The record herein discloses that at every stage of the administrative remedy imposed by the so-called Renegotiation Act of April 28, 1942, as amended from time to

time, petitioner has protested the denial of due process of law made evident by Section 403(e)(1) and (2) of said Act. Therefore, in the light of what was said by this Honorable Court in the case of *Aircraft and D. Equipment Corporation, supra,* petitioner has reserved its right to make application for full judicial consideration of its claim to the protection of due process of law under the judicial articles of the Constitution of the United States.

15. The case of *Brinkerhoff-Faris Trust & Savings Company* vs. *Hill,* 281 U. S. 673 (74 L. Ed. 1107) illustrates quite clearly that a legislative and/or judicial *withholding* of "judicial review" of matters underlying a "case or controversy" within the meaning of Article III of the Constitution of the United States is a denial of due process of law; and it would appear that a legislative attempt to withhold judicial consideration of matters underlying a case or controversy within the meaning of Article III of the Constitution of the United States could not be more clearly demonstrated than is proposed by the language of Section 403(e)(1) and (2) of the Act of April 28, 1942, as amended. Therefore, there is no effect to be attributed to the decision of The Tax Court of the United States entered April 6, 1948; but unless the conflict that is apparent between decisions of this Honorable Court and the judgment of the United States Court of Appeals for the District of Columbia herein—with respect to the meaning of the term "judicial review and/or consideration"—be reconciled by an authoritative decision of this Court herein, a grave injustice will be done to petitioner and the judicial articles of the Constitution will be by-passed by Section 403(e)(1) and (2) of the Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943.

16. There are inescapable questions of law, arising out of the facts that ought to have been decided in petitioner's favor by The Tax Court, and should have been considered

by the United States Court of Appeals for the District of Columbia, on the errors assigned in the petition for review. Such questions have to do with the allowance of amounts due Messrs. Floyd and Wiik as proper expenses incurred and inescapable as to payment by petitioner, viz: (a) The evidence is undisputed and the Court found that neither Floyd nor Wiik have any family relationship whatsoever to any of the stockholders, officers or directors of the Ring Construction Corporation; that neither of them were ever stockholders of the corporation; that their contracts were usual in the trade and were of the type that they had for a substantial length of time before the Camp McCoy work was undertaken; that their fixed compensation was very low, and that in some years they earned much less than their time was worth; (b) on the basis of these undisputed facts, it is our position that the Court was required to allow in full the amounts of their contract claims as "job cost"; (c) the First Amendment to the Renegotiation Act, Section 403(c)(3), made effective as of the date of the original act provides: "In determining the excessiveness of profits * * * the secretary *shall* recognize the properly applicable exclusions and deductions of the character which the contractor, or subcontractor, is allowed under Chapter 1 and Chapter 2 E of the Internal Revenue Code."; (d) the rules of The Tax Court with respect to such matters are fully discussed in *Mertens' Law of Federal Income Taxation* (1942 ed.), Vol. 4, page 396, in which we find the statement at pages 401-402:

> "If the contingent compensation is paid pursuant to a free and arm's length bargain between employer and the individual, particularly where made before the services are rendered, and the terms are not influenced by any consideration on part of the employer other than that of securing on fair and advantageous terms the services of the individual, the payment will be deductible as salary or compensation even though in the actual working out of the contract

the amount received by the employee is greater than the amount which would ordinarily be paid."

17. The decision of The Tax Court denied petitioner an allowance of proper cost and expense incurred in the performance of the contracts in question by reducing very materially the allowance which was required as a matter of law to have been made by reason of the services of Messrs. Floyd and Wiik. This reduced the "job cost" of the contracts with the Government, and therefore reduced the profits that petitioner may enjoy pursuant to the decision of The Tax Court, making them considerably less than is reasonable and/or adequate from the standpoint of due process of law as guaranteed by the Fifth Amendment, and as required to be allowed by the Renegotiation Act. The question of whether the decision of The Tax Court herein squares with the principle of due process of law is inescapably a "judicial issue" within the meaning of the judicial Articles of the Constitution; but it is evident by judgment of the appellate court herein that full judicial review of petitioner's right to "judicial consideration" of vital questions of law is expressly withheld by Section 403(e)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943. Even though petitioner be cast on the legal questions involved herein, on a full judicial review of its constitutional rights, the basic issue is that *judicial consideration* thereof may not be denied *in limine* nor may it be *withheld,* as proposed.

PRAYER FOR WRIT

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a

transcript of the record and proceedings herein. Your petitioner further prays that the judgment of the United States Court of Appeals for the District of Columbia be reversed by this Honorable Court, and that petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated this the 10th day of March, 1950.

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MEMORANDUM
BRIEF IN SUPPORT OF PETITION FOR WRIT

The pertinent questions and basic issues presented are,—

1. Was the Court in error in refusing to review the errors of law claimed to have been committed by The Tax Court?

2. Did the Circuit Court err in sustaining the constitutionality of the Renegotiation Act in the light of the Fifth Amendment as to this contract between the petitioner and the United States Government, it not being a mere sub-contract?

3. Was the Circuit Court in error in refusing to make an exception to the Act based upon the character of the services and material to be furnished under the contract, the same not being new in the market, and the cost and value thereof being readily determinable, and having been in fact determined by the Government before the contract was let?

In the event Section 403(e)(1) and (2) of the Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943, be invalid only with respect to its provisions which withhold judicial review, then the judgment of the United States Court of Appeals for the District of Columbia is erroneous for the reason that it should have taken full jurisdiction of the petition for review to resolve the judicial questions presented, viz:

1. If The Tax Court may, in violation of well established rules of law, make a finding of fact which is not subject to review, then many previous decisions of this Court are set at naught. The right of judicial review by due process of law will have been negated. The contract with the United States Government is a property right,

and the same may not be impaired without just compensation, nor does war suspend the Fifth Amendment with respect to property taken for public use. Rights such as these may not be placed at the mercy of administrative officials or tribunals without the right to judicial review.

Chicago, M. & St. P. Ry. Co. v. *State of Minnesota ex rel. Railroad and Warehouse Commission,* 134 U. S. 418, 10 S. Ct. 462

Monongahela Navigation Co. v. *United States,* 148 U. S. 312, 13 S. Ct. 622

Ohio Valley Water Co. v. *Ben Avon Borough et al,* 253 U. S. 287, 40 S. Ct. 527

United States v. *New River Collieries Co.,* 262 U. S. 341, 43 S. Ct. 565

Phillips et al. v. *Commissioner of Internal Revenue,* 283 U. S. 589, 51 S. Ct. 608

Crowell, Deputy Commissioner, v. *Benson, Crowell, Deputy Commissioner et al* v. *Same,* 285 U. S. 22, 52 S. Ct. 285

St. Joseph Stock Yards Co. v. *United States et al,* 298 U. S. 38, 56 S. Ct. 720

Myers et al. v. *Bethlehem Shipbuilding Corporation, Limited, Same* v. *MacKenzie et al,* 303 U. S. 41, 58 S. Ct. 459

Bowles, Administrator, Office of Price Administration v. *Willingham et al.,* 321 U. S. 503, 64 S. Ct. 641

Yakus v. *United States. Rottenberg et al* v. *Same,* 321 U. S. 414, 64 S. Ct. 660

2. Among the errors of law claimed to have been committed by The Tax Court, and which the Circuit Court refused to review but held to be final and conclusive are the following:

A. The Tax Court held that the burden of proof is on the petitioner to show that it had not received excessive profits.

B. The Court failed to give proper weight to the element of risk involved in the principal contract, and ignored the absence of proof by the Government that the contract price was unfair.

C. The Court refused to give credit as part of the job cost for the sum of over $110,000 paid to one Floyd, and over $102,000 paid to one Wiik, in violation of Chapter 1 and Chapter 2 E, of the Internal Revenue Code, as required by the first amendment of the Renegotiation Act, Section 403 (c) (3).

D. The Court's ruling that the petitioner's profits were excessive was erroneous as a matter of law.

3. The Court erred in applying the Renegotiation Act to this large contract for the erection of cantonments. The evidence in the case conclusively shows that there is nothing novel about the erection of cantonments consisting of frame buildings, many of typical design duplicated over a large area; and further shows that the Government had skilled men well qualified to prepare plans and specifications and estimate the cost of such work before letting a contract, and that it did so in this case; the record further shows that almost identical work of identical units was let to other contractors at the same time at higher prices, and that after the contract was let the Government offered petitioner additional units at higher unit prices, which it refused to take. There was no reason why the Government could not, and as a matter of fact it did deal entirely at arm's length with the petitioner, being at least equal in bargaining strength. If, arguendo, the Act was generally constitutional as to certain types of hazardous and novel procurement, then the Court should have said that even if the statute is valid for one set of circumstances it could not be applied to the circumstances here under consideration, because under such circumstances it was wholly unreasonable. *Nebbia* v. *People of the State of New York,* 291 U. S. 502, 54 S. Ct. 505.

4. The Circuit Court erred in holding that the rights of petitioner against the United States, arising out of a

contract with it, are not protected by the Fifth Amendment.

United States v. *Central Pacific Power Co.*, 118 U. S. 235, 6 S. Ct. 1038

United States v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 41 S. Ct. 439

Lynch v. *The United States*, 292 U. S. 571, 54 S. Ct. 840

Sinking Fund Cases, 99 U. S. (Otto) 700, 25 S. Ct. Rep. 504.

Chicago, etc., Ry. v. *United States*, 104 U. S. (Otto) 680, 26 S. Ct. Rep. 891

Choate v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565

Perry v. *United States* 294 U. S. 330.

5. The Court's decision was based upon *Lichter* v. *United States*, 334 U. S. 742. This was erroneous. The language of the Court in the *Lichter* case clearly indicates that the decision was made only as to existing contracts between private parties, and did not involve a case between a private party and the United States. The instant case is the only reported case involving a contract *directly* with the Government, and in which the petitioner has exhausted its administrative remedy; cases involving a failure to exhaust the administrative remedy are not applicable here.

See also *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 44 S. Ct. 169.

SUMMARY

This petition raises a question involving the application of the Fifth Amendment of the Constitution of the United States not previously passed upon by this Court; the decision of the Circuit Court is in clear violation of the previous decisions of this Court hereinbefore listed; the

issues involved are of the utmost public importance and may be said to involve the very integrity of the Government of the United States.

This Court, in the case of *Estep* vs. *United States,* 327 U. S. 114, said:

> Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 S. Ct. 33; Gegiow v. Uhl, 239 U. S. 3, 60 L. ed. 114, 36 S. Ct. 2; Stork v. Wickard, 321 U. S. 288, 88 L. ed. 733, 64 S. Ct. 559. Judicial review may indeed be required by the Constitution, Ng Fung Ho v. White, 259 U. S. 276, 66 L. ed. 938, 42 S. Ct. 492.

At p. 122 of the opinion in the *Estep case* the Court continued to discuss the judicial reviewability of such "final" actions of the local draft boards as administrative agencies in the following language:

> * * * We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loathe to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused. The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. *The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.* The question of jurisdiction of the

> local board is reached only if there is no basis in fact for the classification which it gave the registrant. See Goff v. United States (CCA 4th) 135 F. 2d 610, 612.
>
> Falbo v. United States, 320 U. S. 549, 88 L. ed. 305, 64 S. Ct. 346, supra, does not preclude such a defense in the present cases. In the Falbo case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them. (Emphasis supplied)

Consequently, a judgment of the Third Circuit affirming a conviction of the registrant in the District Court for the Western District of Pennsylvania was reversed on the ground that the *finality conferred* by the Act to the decisions of the local boards did not foreclose judicial determination of the question whether in classifying the registrant a board acted within its jurisdiction.

Unlike the *Estep case,* Congress was not silent in Section 403(e)(1) and (2) of the Renegotiation Act of 1942, as amended by Section 701(b) of the Revenue Act of 1943, as to the judicial reviewability of the final "determination" of a purely administrative agency, The Tax Court. Such review is *expressly forbidden* by the language of Section 403(e)(1) of the Act. This was a dual command both to potential litigants and the courts, including this court. This amounted to a legislative injunction against the exercise by our Federal Courts, constitutionally created, of their historic duty of judging the validity of a "final" administratve order or decision. This command by Congress seems to constitute a bold and declared intention to deprive a litigant *of due process of law under the Fifth Amendment.* Such denial of due process of law amounts to confiscation. (See *Dayton-Goose Creek Ry. Co.* vs. *United States,* 263 U. S. 456.)

Confiscation of property is not tolerated to any greater degree than is a denial of liberty.

The opinion and judgment of the United States Court of Appeals for the District of Columbia in this proceeding appears to be in conflict with the opinion of the Court in the case of *Knowles* vs. *Hirsch*, 65 Fed. Supp. 690. The *Knowles case* was before a statutory 3-Judge Court sitting for the District of Columbia. In that case the Court speaks of the constitutionality of appropriate appellate court action to review a determination by The Tax Court within the meaning of Section 403(e)(1) and (2) of the Renegotiation Act of April 28, 1942, as amended by Section 701(b) of the Revenue Act of 1943, viz:

> "The plaintiff's plea of the statute's unconstitutionality is prematurely presented here, as it should be urged first in the Tax Court. That court, in tax cases, has passed upon constitutional questions heretofore, and its decisions concerning them have been appealed and the appeals so taken have been considered by the courts. While the Renegotiation Act provides that when the Tax Court has redetermined the amount of excessive profits there shall be no judicial review of its determination, it does not follow that a Tax Court decision concerning the constitutionality of the Act may not be reviewed by the courts. Since the Tax Court is an agency in the executive branch of the government, it does not have, and could not be given, final or exclusive jurisdiction to determine constitutional questions. The power to pass on the constitutionality of an act of the Congress is a prerogative of the judicial branch of the government. Constitutional questions under the Renegotiation Act are, in the first instance, part of the case before the Tax Court, but, as with questions of jurisdiction, the decisions of that court concerning them are appealable. Consequently, the plaintiff in the case at bar must first present his constitutional question to the Tax Court if he desires to obtain an adjudication concerning it."

We submit that the constitutionality of Section 403(c) (1) and (2) of the Act is a question which this Court should decide authoritatively.

Respectfully,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	20
Appendix	21

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752	10, 14
Beer Co. v. *Massachusetts*, 97 U. S. 25	19
Blanchard Machine Co. v. *RFC Price Adjustment Board*, 177 F. 2d 727, certiorari denied, No. 540, this Term (March 13, 1950)	10
Butchers' Union v. *Crescent City Co.*, 111 U. S. 746	19
Butler v. *Pennsylvania*, 10 How. 402	19
Chicago & Alton R. R. v. *Tranbarger*, 238 U. S. 67	19
Crane v. *Hahlo*, 258 U. S. 142	14
Dobson v. *Commissioner*, 320 U. S. 489	15
Estep v. *United States*, 327 U. S. 114	14
Floyd v. *Ring Construction Co.*, 66 F. Supp. 436	8
Heiner v. *Diamond Alkali Co.*, 288 U. S. 502	14
Hilton v. *Merritt*, 110 U. S. 97	14
Horowitz v. *United States*, 267 U. S. 458	19
Howell Electric Motors Co. v. *United States*, 172 F. 2d 953	17
Ill. Central Rd. v. *Illinois*, 146 U. S. 387	19
Lichter v. *United States*, 334 U. S. 742	6, 15-16, 17, 18, 19, 20
Lincoln Electric Co. v. *Forrestal*, 334 U. S. 841	15, 16, 17
Lynch v. *United States*, 292 U. S. 571	18, 19
Newton v. *Commissioners*, 100 U. S. 548	19
North American Commercial Co. v. *United States*, 171 U. S. 110	19
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	14
Passavant v. *United States*, 148 U. S. 214	14
Perry v. *United States*, 294 U. S. 330	18-19
Providence Bank v. *Billings*, 4 Pet. 514	17
Spaulding v. *Douglas Aircraft Co.*, 154 F. 2d 419	10, 13
Stein Bros. Mfg. Co. v. *Secretary of War*, 7 T.C. 863	13
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38	14

Cases—Continued

	Page
Stone v. *Mississippi*, 101 U. S. 814	19
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	14
United States v. *Hudson*, 299 U. S. 498	18
United States v. *Ju Toy*, 198 U. S. 253	14
U. S. Electrical Motors v. *Jones*, 153 F. 2d 134	10
United States Trust Co. v. *Helvering*, 307 U. S. 57	17
Welch v. *Henry*, 305 U. S. 134	18
West River Bridge Co. v. *Dix*, 6 How. 507	19
Williamsport Co. v. *United States*, 277 U. S. 551	14

Constitution and Statutes:

Constitution of the United States:

Fifth Amendment 13, 18

Act of June 30, 1945, c. 210, 59 Stat. 294 13

First Renegotiation Act, Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, Act of April 28, 1942, c. 247, Title IV, 56 Stat. 226, 245:

Sec. 403(a)	21
Sec. 403(b)	21
Sec. 403(c)	22
Sec. 403(d)	23
Sec. 403(e)	24
Sec. 403(f)	25
Sec. 403(g)	25
Sec. 403(h)	25

Internal Revenue Code:

Sec. 1141	8, 11
Sec. 1141(a), as amended	11
Sec. 1141(b)	11
Sec. 1142	11

Revenue Act of 1943, Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78, Sec. 701(b) adding Sec. 403(e) to the Renegotiation Act 7, 9, 10, 26

Miscellaneous:

89 Cong. Rec. 9934-9936	12
90 Cong. Rec. 505 *et seq.*	12
90 Cong. Rec. 1300, 1351, 1354, 1355	12
Hearings, House Committee on Ways and Means, 79th Cong., 1st sess., on H.R. 2628	12-13

Miscellaneous—Continued

	Page
Hearings, Senate Committee on Finance, 78th Cong., 1st sess., on H. R. 3687	12
H. R. 2628, 79th Cong., 1st sess.	12
H. R. 3395, 79th Cong., 1st sess.	13
H. Rep. 725, 79th Cong., 1st sess.	13
H. Rep. 1079, 78th Cong., 2d sess.	12
H. Rep. 871, 78th Cong., 1st sess.	12
S. Rep. 627, 78th Cong., 1st sess.	12

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 656

RING CONSTRUCTION CORPORATION, PETITIONER

v.

THE SECRETARY OF WAR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 27-59) are reported at 8 T. C. 1070. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 957-960) is reported at 178 F. 2d 714.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1949 (R. 961). Peti-

tioner's petition for rehearing filed on November 17, 1949 (R. 962-964) was denied on January 14, 1950 (R. 965). The petition for a writ of certiorari was filed March 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 403 (e) of the Renegotiation Act, added by Title VII of the Revenue Act of 1943, accords finality to rulings by the Tax Court on questions of law and fact, not involving jurisdictional or constitutional issues, arising in the course of that court's redetermination of the amount of a contractor's excessive profits.

2. Whether the according of such finality to a determination of the Tax Court violates the due process provision of the Fifth Amendment.

3. Whether the Renegotiation Act validly authorized the renegotiation of contracts with the War Department entered into before, but not completed or paid for until after, April 28, 1942, the date of the enactment of the original Renegotiation Act.

STATUTES INVOLVED

The pertinent provisions of the original Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) and of its amendment by the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78) are set forth in the Appendix, *infra,* pp. 21-28.

STATEMENT

Petitioner instituted this proceeding, on May 22, 1944, by filing its petition in the Tax Court of the United States for a redetermination of the unilateral determination of the Under Secretary of War that petitioner's excessive profits on two 1942 construction contracts with the War Department amounted to $1,365,000 (R. 7-12). After respondent answered (R. 25-27) and a hearing was held, based upon oral testimony, documentary evidence and agreed stipulations of fact, the Tax Court entered its decision for the Government and redetermined petitioner's excessive profits on these two contracts as $1,208,965.13 (R. 27-60). On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed (R. 957-960).

A. *Findings of the Tax Court.* The pertinent facts, as stipulated by the parties and as found by the Tax Court, may be summarized as follows (R. 28-41, 77-80):

Petitioner is a family-owned Maryland corporation, engaged in construction work, with its principal place of business in Minneapolis. (R. 28, 77.) In response to a War Department invitation of February 28, 1942, for bids to construct two areas (areas C and E) at Camp McCoy, Wisconsin, petitioner submitted a bid totalling $6,650,280 (R. 29). The bids were opened on March 26, 1942; one other bid was submitted on Area C and no other bid was received on area E (R. 29). On the same

day (March 26, 1942), petitioner signed a contract with the War Department for this work (contract No. W-1088 Eng. 1638), and the agreement was approved by the War Department on April 24, 1942 (R. 29). The agreement was in the usual fixed-price construction form, and required completion within six months; it did not contain a renegotiation clause (R. 29-30, 347-380). On October 3, 1942, petitioner and the War Department entered into another contract (No. W-1088 Eng. 1542) for additional buildings at Camp McCoy, for which petitioner had submitted a bid of $78,300 (R. 30-31). Some months after the enactment of the original Renegotiation Act on April 28, 1942, the two contracts were duly completed by petitioner, and, as payment, petitioner received from the Government (taking account of change orders and adjustments) a total of $6,918,988.51 ($6,838,412.21 on the large contract; $80,576.30 on the smaller) (R. 8, 31). The actual, allowable, and reasonable job costs on the two contracts amounted to $4,936,-172.52—exclusive of (a) compensation paid to certain executives, including Floyd and Wiik (*infra*, p. 5), (b) Wisconsin income taxes and interest thereon, (c) federal income taxes and interest thereon, (d) certain other minor expenses, and (e) profit (R. 31). Included in this total job cost was the sum of $2,949,706.03 paid by petitioner to its subcontractors (R. 31).

In the performance of these contracts petitioner employed M. A. Floyd and A. I. Wiik as superintendents and project managers under profit sharing contracts (R. 32, 78). Such contracts are customary in the construction industry and provided for the payment to Floyd and Wiik of 10 per cent of the profits on jobs each estimated and superintended (R. 32). The compensation to which Floyd and Wiik were entitled under their contracts, without giving effect to renegotiation of petitioner pursuant to the renegotiation legislation, is $110,275.32 and $102,388.91, respectively (R. 33, 79). Neither Floyd nor Wiik is related by blood or marriage to the Ring family which owns all of petitioner's stock. They were not stockholders of petitioner and, aside from the employment contracts, had no relationship to it, other than Wiik's being vice president (R. 33). The reasonable value of the services of the two men on the contracts in 1942 was found by the Tax Court to be $60,000 (R. 33).[1]

With regard to the background of the Renegotiation Act, which petitioner claimed was unconstitutional as applied to its prime contract outstanding on April 28, 1942, the Tax Court found that after Pearl Harbor the President issued a directive exempting the Army and Navy from complying with statutes requiring the award of contracts for

[1] In addition, the Tax Court made findings as to the risks assumed by petitioner, the course of the work, and the fairness of the profit made (R. 35-39).

supplies on a competitive basis. Thereafter, construction contracts were let both on a basis of competitive bidding, and without such bidding on a negotiated basis. The volume of Government contracts in general multiplied within a few months after the entry of the United States into war. At the date of the enactment of the Renegotiation Act on April 28, 1942, there were approximately fifty billion dollars of uncompleted contracts on which final payment had not been made (R. 39-40).[2]

B. *Proceedings.* After petitioner had received the full contract prices, renegotiation proceedings were duly commenced by the War Department to determine whether petitioner had made excessive profits on the two contracts in question. Petitioner participated in these proceedings under protest, and questioned the respondent's jurisdiction and authority (R. 8.) No agreement having been reached, the Under Secretary of War (to whom the Secretary of War had delegated his authority under the Renegotiation Act) issued a unilateral determination, on December 20, 1943, finding that "$1,365,000 of the profits realized by the Contractor under said contracts are excessive," and directing petitioner to repay that amount, less the appro-

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[2] Evidence was also introduced concerning the circumstances surrounding the enactment of the Renegotiation Act, similar to that which was before this Court in *Lichter* v. *United States*, 334 U.S. 742, 753-772 (cf. R. 40-1; 439-703).

priate tax credit, to the Treasurer of the United States (R. 15). Notice of this determination was given to petitioner on the same day (R. 13-14, 41).

On May 22, 1944, petitioner filed a petition in the Tax Court seeking a *de novo* determination of its excessive profits under Section 403 (e) (2), added to the Renegotiation Act by Title VII of the Revenue Act of 1943 (Appendix, *infra,* pp. 26-28). The petition attacked the constitutionality of the Renegotiation Act on the ground, *inter alia,* that it could not validly apply retroactively to its contract of March 26, 1942 (R. 9-10). It also challenged the correctness of the Under Secretary's determination (R. 10-12).

The Tax Court, on the basis of the evidence, the parties' stipulation, and its previous decision in another case, held that the Renegotiation Act was valid as applied to petitioner's contracts (R. 41-50) and that the provision vesting power in the Tax Court to decide finally the amount of excessive profits, if any, was constitutional (R. 50). It went on to determine that petitioner was entitled to a profit of about $600,000, or a little less than 12 per cent of its actual costs (R. 51-55). In arriving at this determination, the Tax Court held that the 10 per cent of the profits payable to Wiik and Floyd should be based on the $600,000 received by petitioner *after* renegotiation, in accordance with

the decision in *Floyd* v. *Ring Construction Co.*, 66 F. Supp. 436 (D. Minn.), in which case Floyd had sued petitioner for compensation based upon net profits prior to renegotiation, and had lost (R. 56). It also allowed the amount of $40,964.81 as Wisconsin State income tax on petitioner's profit of $600,000 after renegotiation (R. 58-59).

On appeal, the court below refused to consider petitioner's various assignments of error in regard to the Tax Court's determination of the amount of excessive profits (R. 958). It sustained the Act as applied to prime contracts with the Government outstanding on April 28, 1942 (R. 958-960).

ARGUMENT

1. *Tax Court Review:* In its petition for review of the Tax Court decision, filed in the court below under Section 1141 of the Internal Revenue Code, petitioner claimed *inter alia* that the Tax Court had improperly imposed the burden of proof on it and further that the Tax Court, in determining the amount of excessive profits, had erred with regard to (1) the risks assumed by the contractor and the rates of profit it should fairly earn; (2) the costs it could claim on account of the portions of the profits to be paid to Floyd and Wiik (*supra*, pp. 4-5, 7-8), and (3) the proper allowance on account of its Wisconsin income tax (*supra*, pp. 4, 8). The court below refused to pass upon these alleged errors, as beyond the jurisdiction vested in it by

Section 403 (e) added to the Renegotiation Act by Title VII of the Revenue Act of 1943 (Appendix, *infra*, pp. 26-28). Petitioner asserts that this refusal is based on an erroneous construction of Section 403 (e) (Pet. 20-21), and if this construction were proper, the "unreviewable finality" thereby given to the Tax Court's redetermination "appears to constitute a denial of due process" (Pet. 20).[3] Neither contention, we submit, has any merit.

(a) *Construction:* The court below properly refused to "stop * * * to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court" (R. 958). Section 403 (e) provides that upon the filing of a petition for redetermination, the Tax Court

> shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.

This language is ample to vest at least "exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, includ-

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[3] In its brief below (pp. 18-19), petitioner conceded that "there is no constitutional invalidity in the provision giving the Tax Court the final word on the subject of excessive profits." Although this concession was limited to the prospective application of the Renegotiation Acts, that limitation seems immaterial in light of the formulation of petitioner's position here.

ing questions of both law and fact in such determination." *U. S. Electrical Motors* v. *Jones,* 153 F. 2d 134, 136 (C. A. D. C.) (quoted below at R. 958); *Blanchard Machine Co.* v. *RFC Price Adjustment Board,* 177 F. 2d 727 (C. A. D. C.), certiorari denied, No. 540, this Term (March 13, 1950); see, also, *Spaulding* v. *Douglas Aircraft Co.,* 154 F. 2d 419, 427 (C. A. 9); cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 769.[4]

We believe that other provisions of Section 403 (e), as well as its legislative history, support this conclusion; indeed, it may well be that the courts of appeals were not to review any Tax Court determinations in renegotiation matters and that the court below, in undertaking even limited review, erred in petitioner's favor.[5] Section 403 (e) goes on to provide:

> For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses

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[4] In the *U. S. Electrical Motors, Blanchard,* and the instant cases, the Court of Appeals for the District of Columbia Circuit has held that it has power to review Tax Court renegotiation decisions on matters going to the Tax Court's jurisdiction, the validity of the Renegotiation Act, and, apparently, other issues of law which the court has regarded as unrelated to questions of "amount".

[5] If certiorari is granted, the Government may affirmatively urge that the judgment dismissing the petition for review should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders on any issue.

> and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency.

It should be noted that there is no reference in this detailed and careful enumeration of applicable Internal Revenue Code provisions to Sections 1141 and 1142, which relate to review of Tax Court tax determinations by the courts of appeals.[6] A reasonable inference from this omission is that Congress did not wish to vest jurisdiction in the courts of appeals over Tax Court renegotiation determinations.[7]

This inference finds support in the legislative history of Section 403 (e). The Tax Court provision first appeared in the Report of the House

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[6] Review of Tax Court renegotiation decisions by the courts of appeals would necessitate reconstruction of the venue provisions of Section 1141(b), since in renegotiation there is no action by any "collector," no "return of the tax in respect of which the liability arises," no "Commissioner" and no "taxpayer," the factors determining venue of review by courts of appeals of Tax Court tax determinations.

[7] The provision of Section 1141(a) (as amended by Section 36 of the Act of June 25, 1948, 62 Stat. 869, revising Title 28) vesting jurisdiction in courts of appeals to review Tax Court determinations "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury" obviously is not in conflict (Pet. 22) with the express language of 403(e) in regard to renegotiation determinations, and was not designed to affect the special provisions applicable to renegotiation.

Ways and Means Committee on the bill which became the Revenue Act of 1943 (H. Rep. 871, 78th Cong., 1st sess.). Despite its detailed discussion of the review problem, the Committee made no mention whatever of circuit court action (*id.* at pp. 76 and 77). And although the question as to review was thoroughly discussed by the Houses and committees of Congress, with substantial controversy as to whether the Court of Claims or the Tax Court should review the initial administrative determinations, no suggestion was made at any time that the Tax Court redeterminations would be subject to review by courts of appeals. See 89 Cong. Rec. 9934-9936 (House debates); Hearings, Senate Committee on Finance, 78th Cong., 1st sess., on H. R. 3687, pp. 49, 386, 613, 990, 999, 1000, 1015, 1016, 1017, 1026, 1028, 1032, 1070; S. Rep. 627, 78th Cong., 1st sess., pp. 34, 109-110; 90 Cong. Rec. p. 505 *et seq.* (Senate); H. Rep. 1079, 78th Cong., 2d sess. (Conference report); 90 Cong. Rec. 1300 (Senate), 1351, 1354, 1355 (House).

In addition, it should be noted that when the House Ways and Means Committee was considering H. R. 2628, the bill which extended the termination date of the Renegotiation Act through December 31, 1945, the National Association of Manufacturers proposed that

> 2. Provision should be made for appeals from The Tax Court on questions of law. As in tax cases, disputes arising out of renegotia-

> tion determinations should have benefit of judicial review beyond The Tax Court.[8]

The Committee, after discussion, refused to adopt the proposed amendment (*id.*, pp. 176-187), and the bill so extending the termination date (H. R. 3395, 79th Cong., 1st sess.)—as it was reported from the Committee (H. Rep. 725, 79th Cong., 1st sess.) and as it became law (Act of June 30, 1945, c. 210, 59 Stat. 294)—contained no change in the Tax Court provision.

In these circumstances, since the court below has asserted jurisdiction to review Tax Court renegotiation determinations on certain fundamental issues, petitioner certainly has no basis for complaint.

(b) *Constitutionality:* Congressional denial of appellate scrutiny of alleged errors of the Tax Court in regard to the unreviewed questions of law and fact sought to be raised by petitioner, which questions clearly are not related to jurisdictional or constitutional matters (see *supra*, p. 8), does not violate the Fifth Amendment's due process clause. *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C. A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 882-883. "* * * To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the

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[8] Hearings, House Committee on Ways and Means, 79th Cong., 1st sess., on H. R. 2628, p. 222.

decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, C., C. & St. L. Ry.* v. *Backus,* 154 U. S. 421, 426-427; *Reetz* v. *Michigan,* 188 U. S. 505, 508; *Dohany* v. *Rogers,* 281 U. S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 280; *McMillen* v. *Anderson,* 95 U. S. 37, 41; *United States* v. *Ju Toy,* 198 U. S. 253, 263. * * *" *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 76-77 (Brandeis, J., concurring). This Court has upheld provisions precluding review of questions comparable to those raised by petitioner in a number of cases. See, as examples, *Crane* v. *Hahlo,* 258 U. S. 142; *Hilton* v. *Merritt,* 110 U. S. 97; *Passavant* v. *United States,* 148 U. S. 214; *United States* v. *Ju Toy,* 198 U. S. 253; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320; cf. *Williamsport Co.* v. *United States,* 277 U. S. 551; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502; see, also, *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 303-304; *Estep* v. *United States,* 327 U. S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 76-82 (Brandeis J., concurring). The validity of the finality provision is even stronger here since the agency issuing the allegedly erroneous order is the Tax Court which has "essentially judicial procedures and experience." *Aircraft & Diesel Corp.*

v. *Hirsch,* 331 U. S. 752, 769; *Dobson* v. *Commissioner,* 320 U. S. 489, 498-499.

2. *Constitutionality of retrospective renegotiation of prime contracts:* Petitioner has never questioned the constitutionality of the prospective application of the Renegotiation Act to prime contracts, and hence accepts as proper the renegotiation of its War Department contract of October 3, 1942 (R. 42). Petitioner also agrees that this Court sustained retrospective renegotiation in *Lichter* v. *United States,* 334 U. S. 742, but it contends that this holding applies only to subcontracts (contracts between private citizens) and not to prime contracts as to which, petitioner claims, decision was reserved (Pet. 32).[9]

(a) That the Court did not limit its holding as to retroactivity in *Lichter* to subcontracts appears from its discussion of that subject, as well as from the simultaneous decision in *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841. The *Lichter* section on retrospective application is headed by the general statement: "The Renegotiation Act, including its amendments, has been properly applied to con-

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[9] The sentence in the *Lichter* opinion, on which petitioner's argument that the prime contract question was reserved, reads: "We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government nor on any subcontract upon which final payment had been made before April 28, 1942, although relating to war goods made or services performed after the declaration of war, December 8, 1941" (334 U.S., at 788).

tracts entered into before its and their respective enactments"; and the Court, in speaking of the limitation of the Renegotiation Act to future contracts and to contracts already existing but upon which final payments had not been made at the time of the passage of the original Act, expressly refers both to "subcontracts" and to "contracts made directly with the Government." 334 U. S., at 788. The Court also declared the right of the Government to recapture excessive profits "whether they arose from contracts made before or after the passage of the Act. A contract is equally a war contract in either event and, if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized as has been done here." 334 U. S., at 789. We believe the only question left open in *Lichter* was whether legislation such as the Renegotiation Act could validly be applied to contracts which had been fully performed and paid for before its enactment. And in the *Lincoln Electric* case, the Court in a *per curiam* opinion disposed of the issue of the constitutionality of the Renegotiation Act in regard to existent prime contracts on the authority of the *Lichter* case, which it decided on the same day.[10]

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[10] Throughout the *Lincoln Electric* litigation, the contractor claimed *inter alia* that the Act could not validly be applied either to its contracts with the War and Navy Departments and the Maritime Commission, in effect from five months to one day prior to April 28, 1942, or to its contracts with the

(b) Apart from the holdings in *Lichter* and *Lincoln Electric*, the Court's reasoning in the former case, sustaining renegotiation of private contracts entered into before April 28, 1942 (see 334 U. S., at 788-789), supports the validity of its retrospective application to prime contracts, such as petitioner's; that case furnishes no basis for the argument that whatever the power of Congress over private contracts the Government is constitutionally barred from altering its own contracts by subsequent legislation or by administrative action pursuant thereto. A renegotiation order generally does not directly alter or modify any terms of the renegotiated contract. On the contrary, as the instant case illustrates (R. 13, 77), the contracts are performed according to their terms and the full contract price is paid; all that happens in renegotiation is that the excessive profits realized on the renegotiable business are required to be repaid (see, *e. g.* R. 15). The recapture of such excessive profits on prime contracts is analogous to a retroactive income tax which may be extended to profits earned under governmental contracts. Cf. *Providence Bank* v. *Billings*, 4 Pet. 514, 561-562;[11] *United States Trust*

Treasury Department which were in effect six months to one month prior to April 28, 1942.

Howell Electric Motors Co. v. *United States*, 172 F. 2d 953 (C.A. 6) also upheld the validity of the Act, and the applicable amendments, as applied to both prime and subcontracts existing on April 28, 1942.

[11] In the *Providence* case, Chief Justice Marshall said (p. 562):

"Land, for example, has, in many, perhaps, in all the states, been granted by government, since the adoption

Co. v. *Helvering,* 307 U. S. 57, 60-61; see *United States* v. *Hudson,* 299 U. S. 498; *Welch* v. *Henry,* 305 U. S. 134; *Lichter* v. *United States,* 334 U. S. 742, 787. There is no reason why recapture of excessive war profits through renegotiation—under the war powers—should be treated more stringently than normal peacetime retroactive income taxation under the taxing power.

Moreover, the due process clause of the Fifth Amendment does not prohibit every congressional modification of the terms of Federal contracts. In *Lynch* v. *United States,* 292 U. S. 571, this Court, despite its invalidation of the statute there involved, recognized that Congress, no less than the states, has power to modify government contracts if "the action taken falls within the federal police power or some other paramount power" (at p. 579).[12] And the exercise of that power in appro-

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of the constitution. The grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases."

[12] The holding in the *Lynch* case is distinguishable, as the court below noted (R. 960). The statute there invalidated sought to repudiate the obligations expressly assumed in contracts of personal insurance for no better reason than to save the Government money. As this Court commented: "The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power." 292 U.S. at 579-580. *Perry* v. *United States,* 294 U.S. 330 is similarly distinguishable; the statute there involved specifically undertook to

priate circumstances has been expressly upheld. *Horowitz* v. *United States,* 267 U. S. 458, 461; *North American Commercial Co.* v. *United States,* 171 U. S. 110, 137.[13] In the case of war contracts, the great public interest served by the Renegotiation Act (cf. *Lichter* v. *United States,* 334 U. S., at 754-756, 758-768, 770-772), and the pressing need for its retrospective application serve to validate the application of the Federal Government's "paramount" war powers to preexisting Government contracts, just as to private agreements. On the one hand, the contractor's interest in retaining his profits realized under prime contracts is certainly no greater than the same interest in the case of subcontracts, or as against conventional retro-

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annul a gold-clause obligation inserted in United States bonds, under express congressional authorization, for the purpose of guaranteeing against the very depreciated payment contemplated by the 1933 gold-clause legislation. 294 U.S. at 346-347, 348-349. The instant case would be governed by *Lynch* and *Perry* only if Congress had previously sanctioned the inclusion in war procurement contracts of an undertaking not to renegotiate excessive profits under Government contracts, and then had enacted the Renegotiation Act. (It may also be that the *Perry* case relates only to the federal borrowing power, and does not touch at all the regulation of government matériel-procurement obligations, especially in wartime. See 294 U. S. at 350-4.)

[13] Public contracts of the states are likewise subject to subsequent exertion of State police power. See, for example, *Stone* v. *Mississippi,* 101 U.S. 814 (the withdrawal of the lottery privilege); *Butchers' Union Co.* v. *Crescent City Co.,* 111 U.S. 746 (the cancellation of slaughterhouse monopoly); *Newton* v. *Commissioners,* 100 U.S. 548 (alteration of the site of a county seat); *West River Bridge Co.* v. *Dix,* 6 How. 507, 531; *Butler* v. *Pennsylvania,* 10 How. 402, 416; *Beer Co.* v. *Massachusetts,* 97 U.S. 25, 33; *Ill. Central Rd.* v. *Illinois,* 146 U.S. 387, 454; *Chicago & Alton R. R.* v. *Tranbarger,* 238 U.S. 67, 76.

active income taxation. And on the other hand, the long reach of the war power undoubtedly permits greater interference by the Government with contractual arrangements than peacetime would allow. Cf. *Lichter,* 334 U. S., at 754-758, 765-769, 779-782. The exclusion of the 50 billion dollars of war agreements directly with the Government outstanding on April 28, 1942 (*supra,* p. 6) would have rendered the statute largely nugatory. The need for renegotiating these contracts was more compelling, if anything, than the need for renegotiating subsequent contracts since the contracts were entered into in the rush of early defense or war preparations. A program for the control of war profiteering which did not reach these agreements would scarcely have been effective.

CONCLUSION

The holding of the courts below is clearly correct. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. The First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, c. 247, Title IV, 56 Stat. 226, 245) provides:

> SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.
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> (b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduc-

tion in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a

result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive

and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who

knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

2. Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78) provides in part:

Section 403 * * *

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers,

notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or sub-

contractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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